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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1433

TELEVISION RECEPTION CORPORATION, - Petitioner,

versus

COMMONWEALTH CABLE COMPANY, - Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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May it please the Court:

The Petition for Writ of Certiorari does not state grounds which would justify the issuance of the Writ under the criteria contained in Supreme Court Rule 19. Our statement of the case shows that there is no fundamental right of the Petitioner which has been violated or abridged.

STATEMENT OF THE CASE

A brief history of this action is appropriate in response to the Petition for Writ of Certiorari.

This action was commenced by Petitioner, a Kentucky corporation, in the United States District Court

for the Eastern District of Kentucky against Charles A. Dunbar and Dunbar-Murphy Co., both Florida residents. The sole ground of Federal jurisdiction being diversity of citizenship. The claim was based on the breach of a fiduciary obligation in the bidding for a cable TV franchise in the City of Somerset, Kentucky. The relief sought was to recover the franchise from the successful bidder, Dunbar-Murphy, or in the alternative for damages. Pending this action Dunbar-Murphy assigned the franchise to a newly formed Kentucky corporation, Commonwealth Cable Co., the Respondent herein. Commonwealth Cable Co. commenced an action in State Court to enforce its franchise against the Petitioner on the ground that Petitioner was usurping its franchise right. See KRS 415.030, 415.080. Petitioner obtained an injunction from the District Court preventing Respondent from proceeding in State Court, and also an order making the Respondent, Commonwealth Cable Co., a party defendant. Both of those orders were objected to by Respondent in the District Court.

Commonwealth Cable Co., now a defendant in this action, filed a counterclaim against Petitioner, plaintiff in this action, on the same grounds it had asserted in State Court. The Petitioner's reply to the counterclaim was a general denial of usurpation. The action was tried and the District Court rendered a judgment dismissing the Petitioner's claim and granting the Respondent full relief on its counterclaim.

On appeal the action was remanded for new trial for reasons not appropriate to this Petition. The opin-

ion of the Sixth Circuit, A.B-1, dealt at length with the jurisdictional problem presented. The Court held that the City of Somerset was not an indispensible party to the Petitioner's claim for damages, and that under the Kentucky Statutes the City was not a necessary party to a franchise holder's action against a person usurping its franchise right.

Pending the appeal, Petitioner commenced an action against the City of Somerset in State Court to require the City to recognize an old TV cable franchise issued to it in 1958 (the franchise held by Respondent was issued in 1966). A.C-1. On remand, the Respondent obtained an injunction against Petitioner prohibiting its proceeding in State Court. A.C-5. This injunction was issued under the District Court's authority to protect its jurisdiction. 28 USCA Sec. 2283. For this reason the Circuit Court of Appeals affirmed the injunction order. A.C-7. It is this Preliminary Injunction, issued solely to protect federal jurisdiction, that constitutes the Petitioner's main claim of a denial of due process.

Later the District Court granted Petitioner leave to file an amended complaint, setting up its 1958 franchise and asserting that the Respondent was usurping its franchise right because the old franchise was by its terms exclusive. The Petitioner did not attempt to amend its Reply to the Respondent's Counter-claim asserting that the existence of its old franchise constituted an affirmative defense to Respondent's claim. Respondent argued, unsuccessfully, that this amendment was improper after remand because there had

been no change in either law or fact from the time of the commencement of the action to the time of the amendment.

The issues raised by the amended complaint were fully tried on their merits in District Court. The District Court found that the old franchise was not in existence and that the Petitioner had knowledge of the fact. A.D-3(9). The Circuit Court of Appeals in its opinion affirming the Judgment stated, in effect, that the record showed a revocation of the old franchise by the City and that this action of the City was not subject to collateral attack. A.A-3. Although not articulated in the opinion, it was clear that the Petitioner was asserting its old franchise as grounds for a claim for relief and not as an affirmative defense to the Respondent's counterclaim; in this context the Court of Appeals was certainly correct.

CONCLUSION

The Petitioner claims a denial of due process. It initially chose the federal forum. Its alleged dilemma is solely of its own making which resulted in the peculiar conflicts which of necessity exist in our system of federal jurisprudence. Furthermore, its main complaint is the issuance, during the pendency of this action, of a Preliminary Injunction which was granted solely to protect the federal jurisdiction which was invoked initially by the Petitioner.

The Petition for Writ of Certiorari should be denied.

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